A KARUNATHAN ARUNASALAM & ORS A

v.

PENTADBIR TANAH DAERAH PETALING & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
AZHAR MA'AH JCA
SYED AHMAD HELMY JCA
[CIVIL APPEALS NOS: B-01-100-2006 & B01-142-06] C
26 MAY 2011

LAND LAW: *Acquisition of land - Validity - Challenge against - Doctrine of estoppel - Whether applicable - Whether filing of Form N signifies acquiescence - Whether appellants could not both challenge the validity of the land acquisition and simultaneously raise objection to the compensation vide Form N - Whether improper for appellants to raise jurisdictional and nullity issue - Whether appeal dismissed - Land Acquisition Act 1960, ss. 8, 38(4)* D

E

LAND LAW: *Acquisition of land - Compensation - Appeal against - Challenging validity of land acquisition - Doctrine of estoppel - Whether applicable - Whether filing of Form N signifies acquiescence - Whether appellants could not both challenge the validity of the land acquisition and simultaneously raise objection to the compensation vide Form N - Whether improper for appellants to raise jurisdictional and nullity issue - Whether appeal dismissed - Land Acquisition Act 1960, ss. 8, 38(4)* F

LAND LAW: *Acquisition of land - Compensation - Award of compensation - Appeal against - Failure to prove prima facie case - Whether trial judge erred when making award of compensation - Whether court to accept quantum of compensation awarded by Land Administrator - Land Acquisition Act 1960, s. 40D* G

The appellants herein appealed against the decision of the trial judge which awarded the appellants a compensation sum of RM195,900 ('the compensation sum') and an award for 'injurious affection' amounting to RM167,489 pertaining to an award made in respect of the acquisition of the land held under HS (D) 38216 Lot 14225 ('the land'). The principal ground of challenge by the appellant was that the entire acquisition proceedings was a nullity owing to the non-existence of a valid declaration under s. 8 of the Land Acquisition Act 1960 ('the Act'). The nullity issue of the H I

A acquisition arose by way of a preliminary objection by the appellant during the trial and in the course of submission had objected to the jurisdiction of the court in adjudicating the land reference. Briefly, the facts were that an agreement was recorded between the parties on 1 August 1998 whereby the respondent B would have no objection to the appellants' application for an extension of time to file their Form N under the Act and in turn, the appellants would withdraw the Kuala Lumpur High Court Civil Suit ('KL Suit') where the appellant had sought a declaration that the land acquisition was invalid and that it be declared null and C void. The appellants had obtained a consent order granting the appellants an extension of time. The appellants had filed a joint Form N under the Act and subsequently, a land reference was made to the registrar of the High Court by the Land Administrator in Form O under the Act and land reference was duly registered D at the High Court. The learned judge in the High Court had rejected the jurisdictional and nullity objection raised by the appellants on the grounds that to permit the applicants to again challenge the validity of the whole acquisition proceedings and the court's jurisdiction in proceeding with the hearing of the land E reference would be giving the applicants another bite at the cherry. The issues that arose were (i) whether the doctrine of estoppel by acquiescence was applicable herein; (ii) whether the trial judge erred in rejecting the jurisdictional and nullity challenge. The respondent, on the other hand, filed a cross appeal pertaining F to the challenge against the award so made and the error of the trial judge in her conclusion that it was incumbent upon the court to consider the award of compensation as provided for by s. 40D(1) of the Act, notwithstanding that the appellants had failed to establish a *prima facie* case on their claim for higher G compensation.

Held (dismissing appellants' appeal; allowing respondent's counterclaim)

Per Syed Ahmad Helmy JCA delivering the judgment of the H court:

(1) Applying the doctrine of estoppels to the facts herein, it was crystal clear that the withdrawal of the KL suit and the filing of Form N signified acquiescence on the part of the appellants I which caused the respondent to believe that such a challenge would not be pursued anymore and hence the appellants were stopped from further challenging the validity of the land

acquisition which in the words of the trial judge "the applicants (appellants) could not approbate and reprobate". The conduct of the Land Administrator in offering no objection to the appellants' application for extension of time to file in Form N was another aspect of the factual matrix which militated against the appellants' objection as to the validity of the land acquisition bearing in mind the fettering of the court's powers to grant extension of the filing of Form N as prescribed by s. 38(4) of the Act. (paras 18 & 19)

(2) No leave to raise the challenge against the validity of the land acquisition was ever applied for. Hence, in the absence of any leave being obtained, the learned trial judge was correct in dismissing the appellants' objections. It was highly improper of the appellants to throw the jurisdictional and nullity issue through the mechanism of a preliminary objection more so when the issues were in no way related to the Land Reference and the appellants' application under Form N. The trial judge was right in her views that the appellants could not both challenge the validity of the land acquisition and simultaneously raise objection to the compensation *vide* Form N. There was no error on the part of the trial judge in her findings aforesaid and hence for the reasons aforementioned the trial judge's decision was upheld in rejecting the jurisdictional and nullity challenge with the consequential result that the appellants' appeal was hereby dismissed. (para 22)

(3) Regarding the respondent's cross appeal, the trial judge had clearly erred when making the award for compensation in the face of her own finding that the appellant had failed to provide a valuation of the land at the date of the publication of the Gazette. The error was fatal as it offended the trite principle of *prima facie* case which the appellants failed to discharge. Though the Act had been amended through the introduction of a new s. 40D which empowers the court to award compensation in the amount decided by the two assessors and any decision so made shall be final and not subject to any further appeal to a higher court, nevertheless it was still predicated by the burden reposed on the appellants to establish a *prima facie* case. Section 40D does not and cannot absolve the court from making a finding of a *prima facie* case. (paras 33 & 34)

(4) Since there was no evidence adduced that would establish a *prima facie* claim in favour of the appellant, the learned judge had clearly erred in calling upon the assessor to produce a report for her to make the award. Arising from the failure of the appellants to establish a *prima facie* case the court had to accept the quantum of compensation as awarded by the Land Administrator. The respondent's counterclaim was accordingly allowed. (para 38)

Bahasa Malaysia Translation of Headnotes

Perayu-perayu membuat rayuan terhadap keputusan hakim bicara yang telah mengawardkan perayu-perayu dengan bayaran pampasan RM195,900 ('bayaran pampasan') dan award untuk 'kerosakan' berjumlah RM167,489 berkaitan dengan satu award yang dibuat berhubungan pengambilan sekeping tanah di bawah HS (D) 38216 Lot 14225 ('tanah itu'). Alasan utama bantahan perayu adalah keseluruhan prosiding pengambilan tanah sepatutnya dibatalkan kerana ketidakwujudan deklarasi sah di bawah s. 8 Akta Pengambilan Tanah 1960 ('Akta'). Isu pembatalan pengambilan tanah dibangkitkan melalui bantahan awalan oleh perayu semasa perbicaraan dan semasa penghujahan membantah bidangkuasa mahkamah dalam mengadili rujukan tanah. Secara ringkas, fakta-fakta menunjukkan bahawa satu persetujuan telah direkodkan di antara pihak-pihak yang terlibat pada 1 Ogos 1998 di mana responden tidak akan membantah permohonan perayu-perayu untuk perlanjutan masa memfailkan Borang N di bawah Akta dan perayu-perayu pula akan tarik balik Guaman Sivil Mahkamah Tinggi Kuala Lumpur ('guaman KL') di mana perayu telah memohon deklarasi bahawa pengambilan tanah adalah tidak sahih dan ia diisytiharkan terbatal dan tidak sah. Perayu-perayu telah memperolehi perintah persetujuan membenarkan perayu-perayu melanjutkan masa. Perayu-perayu telah bersama-sama memfailkan Borang N di bawah Akta, dan seterusnya rujukan tanah telah dibuat di ke pendaftar Mahkamah Tinggi oleh Pentadbir Tanah dalam Borang O di bawah Akta dan rujukan tanah telah didaftarkan di Mahkamah Tinggi. Yang arif hakim di Mahkamah Tinggi telah menolak isu bantahan bidangkuasa dan pembatalan yang telah dibangkitkan oleh perayu-perayu atas alasan-alasan bahawa untuk membenarkan pemohon-pemohon mencabar kesahihan prosiding pengambilan tanah dan bidangkuasa mahkamah dalam meneruskan dengan perbicaraan rujukan tanah akan memberi perayu-perayu peluang untuk cuba sekali lagi. Isu-isu yang timbul

adalah (i) sama ada doktrin estoppel boleh digunapakai melalui persetujuan; (ii) sama ada hakim bicara salah apabila beliau menolak bantahan bidangkuasa dan pembatalan. Responden pula memfailkan rayuan balas berkaitan dengan bantahan terhadap award yang dibuat dan kesalahan hakim bicara apabila beliau membuat kesimpulan yang mahkamah wajib mempertimbangkan award pampasan seperti yang disediakan oleh s. 40D(1) Akta, walaupun perayu-perayu telah gagal membuktikan kes *prima face* apabila memohon bayaran pampasan yang lebih tinggi.

Diputuskan (menolak rayuan perayu-perayu; membenarkan rayuan balas responden)
Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Dengan menggunapakai doktrin estoppel ke atas fakta-fakta di dalam kes ini, ia adalah sangat jelas bahawa penarikan balik guaman KL dan pemfailan Borang N menandakan persetujuan pihak perayu-perayu yang menyebabkan responden mempercayai perayu-perayu tidak akan membantah dan oleh itu perayu-perayu dihentikan dari terus mencabar kesahihan pengambilan tanah yang mana dalam perkataan hakim perbicaraan 'perayu-perayu ('pemohon-pemohon') tidak boleh aprobat dan reprobat.' Kelakuan Pentadbir Tanah yang tidak mencabar permohonan perayu-perayu untuk perlanjutan masa memfailkan Borang N adalah lagi satu aspek matriks nyata yang menyekat bantahan perayu mengenai kesahihan pengambilan tanah mengambilkira sekatan-sekatan kuasa-kuasa mahkamah untuk membenarkan pemfailan Borang N seperti yang ditetapkan di bawah s. 38(4) Akta.

(2) Tiada permohonan untuk kebenaran membantah terhadap kesahihan pengambilan tanah dipohon. Oleh itu, dengan ketiadaan kebenaran diperolehi, yang arif hakim betul apabila beliau menolak bantahan-bantahan perayu-perayu. Ia adalah amat tidak wajar untuk perayu-perayu membangkitkan isu bidangkuasa dan pembatalan melalui satu mekanisme bantahan awalan lebih-lebih lagi apabila isu-isu tersebut tiada kaitan dengan rujukan tanah atau permohonan perayu-perayu di bawah Borang N. Hakim bicara betul dalam pandangannya bahawa perayu-perayu tidak boleh mencabar kesahihan pengambilan tanah dan pada masa yang sama membangkitkan bantahan terhadap pampasan melalui Borang N. Hakim bicara

tidak salah dalam dapatan-dapatannya dan dengan itu serta berdasarkan alasan-alasan yang disebut di atas keputusan hakim bicara menolak bantahan bidangkuasa dan pembatalan disokong dan rayuan perayu-perayu ditolak.

(3) Berhubungan dengan rayuan balas responden, hakim bicara telah dengan jelasnya khilaf apabila membuat award pampasan atas alasan bahawa perayu telah gagal menyediakan penilaian tanah pada tarikh penerbitan warta. Kesilapan itu adalah fatal kerana ia melanggari prinsip mantap kes *prima facie* yang gagal dilaksanakan perayu-perayu. Walaupun Akta telah dipinda melalui pengenalan s. 40D yang baru yang memberi kuasa kepada mahkamah untuk memberikan award pampasan dalam jumlah yang diputuskan oleh dua penaksir-penaksir dan apa-apa keputusan yang dibuat adalah muktamad dan tidak tertakluk kepada apa-apa rayuan seterusnya ke mahkamah yang lebih tinggi, ia masih berlandaskan beban yang dikenakan atas perayu-perayu untuk membuktikan kes *prima facie*. Seksyen 40D tidak akan dan tidak boleh membebaskan mahkamah dari membuat penemuan kes *prima facie*.

(4) Oleh kerana tiada keterangan dikemukakan yang boleh membuktikan kes *prima facie* yang berpihak kepada perayu, yang arif hakim telah dengan jelasnya membuat kesilapan apabila memanggil penaksir untuk mengemukakan laporan supaya beliau boleh membuat award. Akibat kegagalan perayu-perayu membuktikan kes *prima facie* mahkamah harus terima jumlah pampasan yang telah diawardkan Pentadbir Tanah. Rayuan balas responden dibenarkan.

Case(s) referred to:

Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals [1968] 1 LNS 31 PC ***(refd)***

Damansara Jaya Sdn Bhd v. Pemungut Hasil Tanah Petaling [1992] 4 CLJ 2208; [1992] 1 CLJ (Rep) 52 SC ***(refd)***

Ng Yee Fong & Anor v. EW Talalla [1985] 1 LNS 146 FC ***(refd)***

Ong Yan & Anor v. Collector Of Land Revenue Alor Gajah, Malacca [1985] 1 LNS 105 HC ***(refd)***

Sin Yee Estate Sdn Bhd v. Pentadbir Tanah Daerah Kinta [2005] 4 CLJ 653 FC ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, 38(2), (4), 40D(1), Third Sch para 2(1)

(Civil Appeal No: B01-100-2006)
For the appellant - Dato' R Rajasingham (Pala with him); State Legal Advisor, Selangor
For the respondent - Aimee Liew (Wu Au Yong with him); M/s Kumar Chambers

[Appeal from High Court, Shah Alam; Case No: MT13-15-122-1999]

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy JCA:

[1] There are two appeals brought before us pertaining to an award made in respect of the acquisition of the land held under H.S.(D) 38216 Lot 14225 comprised in the Administrative Area of Pekan Puchong Perdana in the District of Petaling (hereinafter called the land).

[2] The appellant's appeal was registered as Rayuan Sivil No. B-01-100-2006 and relates to the decision of the learned trial judge given on 8 August 2006 which awarded the applicants a compensation sum of RM195,900 calculated at the rate of RM25 per square foot (hereinafter called "the compensation sum") and an award for "injurious affection" amounting to RM167,489 calculated at the rate of RM23 per square foot.

[3] The respondent filed in a cross appeal which was registered as Rayuan Sivil B-01-142-06 pertaining to the challenge against the award so made and the error of the trial judge in her conclusion that it was incumbent upon the court to consider and award compensation as provided for by s. 40D(1) of the Land Acquisition Act 1960 (hereinafter called the Act), notwithstanding that the appellants have failed to establish a *prime facie* case on their claim for higher compensation.

[4] The principal ground of challenge by the appellant in the main appeal is that the entire acquisition proceedings is a nullity owing to the non-existence of a valid declaration under s. 8 of the Act.

[5] The nullity issue of the acquisition arose by way of a preliminary objection by the appellant during the trial and in the course of submission objecting to the jurisdiction of the court in adjudicating the land reference.

[6] The position taken by the appellants in raising the preliminary objection is that since the procedural requirements necessary to effect an acquisition, namely the requirement of effecting a proper declaration under s. 8 of the Act was not followed, the land acquisition was null and void and of no effect. By reason thereof the Land Administrator had no jurisdiction to conduct the land enquiry held on 31 January 1997 which renders it a nullity with the consequential result of the High Court acting in excess of jurisdiction in adjudicating the land reference.

[7] Before addressing the jurisdictional and nullity issue aforesaid it is appropriate to relate the salient facts.

[8] The appellants are the registered proprietors of the land, each holding 1/5 share. A portion of the land measuring approximately 7876 square feet was acquired for the purpose of a road project known as "Project Lebuhraya Damansara Puchong" *vide* Selangor Gazette Notification No. 863/96 published on 26 September 1996 for which the appellants' were awarded compensation of RM156,722.38.

[9] On 3 February 1998, the appellants filed Kuala Lumpur High Court Civil Suit No. S2-21-11-98 seeking a declaration that the land acquisition was invalid and that it be declared null and void. However, an agreement was recorded between the parties on 1 August 1998. According to this agreement, the respondent would have no objection to the appellants' application for an extension of time to file their Form N under the Act and in turn, the appellants would withdraw the abovementioned suit.

[10] Subsequently, in the Shah Alam Originating Summons No. MT1-21-66-98 dated 16 May 1998, the appellants obtained a consent order on 10 August 1998, granting the appellants an extension of time to file their objection in Form N against the compensation awarded to them under the land acquisition.

[11] The appellants then, on 18 August 1998, filed a joint Form N under the Act and subsequently, a land reference was made to the Registrar of the Shah Alam High Court by the Land Administrator in Form O under the Act and the land reference was duly registered at the Shah Alam High Court.

[12] Against the background facts aforesaid though the preliminary objection was dismissed as there was no notice given to the respondent nevertheless the learned judge in her written judgment adverted to give her reasons as to her rejection of the jurisdictional and nullity objection raised by the appellants.

[13] The learned judge's reasoning is found in her written judgment appearing on p. 19 of the Appeal Record wherein she stated:

> Having regard to these events that had transpired, it is quite clear that to permit the Applicants to again challenge the validity of the whole acquisition proceedings and this Court's jurisdiction in proceeding with the hearing of the Land Reference would be giving the Applicants another bite at the cherry. The Applicants cannot approbate and reprobate. They are bound to abide by the consent orders recorded in the earlier court proceedings. Having filed their Form N well out of time frame provided by the law pursuant to all of the consent orders which had been recorded, arising from which the Applicants were before this Court by way of an appeal provided by the relevant law, the issues for determination by this Court in this Land Reference must necessarily be confined to that held out in their Form N (ie, measurement of the land and the amount of compensation) and nothing more. The Applicants, by their conduct, is estopped from challenging the validity of the acquisition as well as questioning this Court's jurisdiction to determine their objections which has been referred to it for consideration and determination.

[14] Now the consent orders referred to by the learned judge relates to the two orders made on 1 August 1998 in Kuala Lumpur High Court Civil Suit No. S2-21-11-98 (hereinafter called the K.L. Suit) whereby the appellants agreed to withdraw the suit upon the respondent's agreement not to object to the appellants' application for extension of time to file in Form N and the subsequent consent order of 10 August 1998 made in Shah Alam Originating Summons No. MT1-21-66-98 (hereinafter called the Shah Alam O.S.) whereby the appellants were granted an extension of time to file in their Form N objection against the compensation awarded to them.

[15] The consent orders aforesaid, it should be emphasised, was predicated by a meeting between two of the appellants (the 3rd & 4th appellants) and their solicitors and the Assistant State Legal Advisor and a representative of the Lembaga Lebuhraya Malaysia on 1 August 1998 as reflected in the minutes appearing at

pp. 640-641 of the Appeal Record, the sum total of which at the expense of repetition was that the appellants would withdraw the K.L. Suit challenging the validity of the land acquisition and the respondent would have no objection to the application by the appellants for an extension of time to file their Form N which was pursued through the Shah Alam O.S.

[16] The factual matrix brings into sharp focus the doctrine of estoppel by acquiescence which in our considered view is applicable.

[17] The doctrine was admirably expressed by our apex court, the then Supreme Court in *Ng Yee Fong & Anor v. EW Talalla* [1985] 1 LNS 146; [1986] 1 MLJ 25 where Mohamad Azmi SCJ defined it as follows:

> The term "acquiescence" is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element in laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche v. Alt* [1978] 8 Ch D 286, 314. In that sense the doctrine of acquiescence may be defined as acquiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable.

[18] Applying the doctrine to the facts herein it becomes crystal clear that the withdrawal of the K.L. Suit and the filing of Form N signifies acquiescence on the part of the appellants which caused the respondent to believe that such a challenge would not be pursued anymore and hence the appellants are estopped from further challenging the validity of the land acquisition which, in the words of the learned trial judge, "the applicants (appellants) cannot approbate and reprobate." We unreservedly endorse the reasoning of the learned trial judge.

[19] It is also worth stressing, in our view, the conduct of the Land Administrator in offering no objection to the appellants' application for extension of time to file in Form N made in the

Shah Alam O.S. as yet another aspect of the factual matrix which militates against the appellants objection as to the validity of the land acquisition bearing in mind the fettering of the court's powers to grant extension of the filing of Form N as prescribed by s. 38(4) of the Act unless special circumstances are shown.

[20] There is a further ground which we would like to advance in rejecting the jurisdictional and nullity challenge of the appellants and that is the appellants are confined to the issues as stated in their Form N. The restriction is statutorily expressed in s. 38(2) of the Act the relevant portion of which in referring to the application under Form N states:

> Every application under subsection (1) shall state fully the grounds on which objection to the award is taken, and at any hearing in Court no other grounds shall be given in argument, without leave of the Court.

[21] The rationale for leave is aptly laid out in *Sin Yee Estate Sdn Bhd v. Pentadbir Tanah Daerah Kinta* [2005] 4 CLJ 653 where the Federal Court in affirming the Supreme Court decision of *Damansara Jaya Sdn Bhd v. Pemungut Hasil Tanah Petaling* [1992] 4 CLJ 2208; [1992] 1 CLJ (Rep) 52 stated:

> In *Damansara Jaya Sdn Bhd v. Pemungut Hasil Tanah Petaling* [1992] 4 CLJ 2208; [1992] 1 CLJ (Rep) 52, it was held that an objector is entitled, provided prior leave of the court is obtained, to make a fresh claim or raise a new ground of objection to an award of the collector in the course of the reference proceedings at the High Court which he had failed to do at the enquiry before the collector. Harun Mahmud Hashim, SCJ stated:
>
> > Such an application for leave will afford the Collector an opportunity to make the necessary inquiries to file an affidavit in reply and where necessary to object to the application. The additional ground should not be made, as was done here, by throwing it at the face of the Court for the first time at the hearing of the reference proper which caught the Collector and the Court by surprise.

[22] It is an undisputed fact that no leave to raise the challenge against the validity of the land acquisition was ever applied for. The issues raised by the appellants relates to the measurement of the land and the amount of compensation - see p. 42 of the Appeal Record. Hence in the absence of any leave being obtained it is our considered view that the learned trial judge was correct in dismissing the appellants' objections. It is highly improper of the

appellants to throw the jurisdictional and nullity issue through the mechanism of a preliminary objection more so when the issues are in no way related to the Land Reference and the appellants' application under Form N.

[23] It has not escaped our attention the statement of the learned trial judge in her written judgment which appears at p. 432 of the Appeal Record which we wholeheartedly endorse wherein she stated:

> The applicants cannot approbate and reprobate. The Applicants cannot in one breadth say that the acquisition is invalid, the inquiry before the Land Administrator is null and void and that this Honourable Court would be acting in excess of jurisdiction in adjudicating this Land Reference and in the next breadth file Form N requiring the Land Administrator to refer the matter to the Court for determination where the only objections raised in Form N were to the measurement of the amount of the compensation.

[24] In our view the learned trial judge was right in her views that the appellants cannot both challenge the validity of the land acquisition and simultaneously raise objection to the compensation *vide* their Form N.

[25] In concluding on the jurisdictional and nullity issue the learned judge made certain findings that goes against the challenge advanced by the appellants and the findings which appear at p. 20 of the Appeal Record states:

> Further, even if this Court were to entertain the challenges raised, it is my finding that the Applicants' contention on this issue is devoid of merit and substance. Accepting the fact that Selangor Gazette Notification No. 863/96 as initially published on 26.9.1996 has not accurately specified the "Mukim" under which the subject properly falls under, this omission has been duly corrected by the amendment made by Selangor Gazette Notification No. 1043/96 published on 7.11.96 [ie, Item (iv)], by the insertion of a heading "Daerah/District - Petaling - Mukim - Petaling" between reference to lot "899" and "PT 33948". I hold that the omission to insert as a heading the "Mukim" under which the respective lands falls under, does not, affect the validity of the acquisition of the subject property for the LDP Project in any way.

[26] We cannot see any error on the part of the learned trial judge in her findings aforesaid and hence for the reasons aforementioned we uphold her decision in rejecting the

jurisdictional and nullity challenge with the consequential result that the appellants' appeal in Rayuan Sivil No. B-01-100-2006 is hereby dismissed with costs.

[27] Coming to the respondent's cross appeal in Rayuan Sivil No. B-01-142-06 after due consideration of the written grounds of judgment of the learned trial judge and the submissions both oral and written of the parties, we allowed the respondent's appeal with costs.

[28] The cross appeal by the respondent relates to the award made by the learned trial judge awarding the sum of RM195,900 as compensation and a further sum of RM167,489 for "injurious affection" for the acquisition of the land. The challenge against the award is premised on the respondent's contention that since the appellants have not established a *prima facie* case for compensation by reason of the trial judges' rejection of the appellants' valuation report there is no basis to award the compensation sum as awarded and the appellants' claim has to be dismissed outright. In short it is the respondents' position that in the absence of any evidence of valuation (the valuation Report having been rejected by the court) the court has to accept the quantum as awarded by the Land Administrator. Hence as no *prima facie* case has been established the trial judge erred in her conclusion that it is incumbent upon the Court to consider compensation as provided for under s. 40D(1) of the Act.

[29] Adverting to her grounds of judgment the learned trial judge (at p. 27 of the Appeal Record) held that the appellants had failed to give any opinion on the market value of the land as at the date of the publication in the Gazette of the notification under s. 4 of the Act. She categorically opined:

> Paragraph 2(1) of the Third Schedule of the Act provides that the applicants (appellants) valuer's report must establish a *prima facie* case for the applicants. On the facts of this case the applicants' valuer has not given any opinion on the value of the subject property as at 26.9.1996. (emphasis added)

[30] Having opined as such she went further by holding that:

> Be that as it may, it is still incumbent upon this Court under Section 40D(1) of the Act to consider the amount of compensation payable or as to the amount of any of its items with the aid of the two assessors sitting with me.

[31] The requirement that the appellants valuers' report alone must establish a *prima facie* case is to be found in s. 2(1) of the Third Schedule of the Act.

[32] The question that arises is that since the trial judge has rejected the appellants' Valuation Report, can it be said that the appellants have made out a *prima facie* case of inadequate award. The answer to our mind is an emphatic no. As was said by Wan Yahya J in *Ong Yan & Anor v. Collector of Land Revenue Alor Gajah, Malacca* [1985] 1 LNS 105; [1986] 1 MLJ 405 at p. 407:

> In land acquisition cases the burden is on the applicant to make out a *prima facie* case of inadequate award. Only when he succeeds in doing so would the respondent be called upon to introduce his evidence; otherwise the applicant's case must fail and the collector's award should stand.

[33] The trial judge in our opinion clearly erred when making the award for compensation in the face of her own finding that the appellant had failed to provide a valuation of the land at the date of the publication of the Gazette. The error is in our view fatal as it offends the trite principle of *prima facie* case which the appellants failed to discharge.

[34] In this regard we are also of the view that though the Act has been amended through the introduction of a new s. 40D which empowers the court to award compensation in the amount decided by the two assessors and any decision so made shall be final and not subject to any further appeal to a higher Court, nevertheless it is still predicated by the burden reposed on the appellants to establish a *prima facie* case. Section 40D does not and cannot absolve the Court from making a finding of a *prima facie* case.

[35] This is because of the principle that was established in the Privy Council case of *Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals* [1968] 1 LNS 31; [1971] 1 MLJ 43 which ruled that a land reference to the High Court is not in the nature of an appeal. Rather, it is an original hearing wherein the onus lay on the applicant to satisfy the court that the amount of compensation awarded was inadequate.

[36] At p. 44 of the judgment Lord Diplock stated: A

> Although upon referring an objection to the High Court for its determination the collector is required to state the grounds on which the amount of compensation was determined, the reference to the High Court is not in the nature of an appeal from the collector's award. It is in the nature of an original hearing in which the applicant is the plaintiff and the collector the defendant. The onus lies upon the applicant to satisfy the court by evidence that the amount of compensation awarded is inadequate; and the collector is entitled to call evidence in support of the amount awarded. His evidence is not confined to supporting the award upon the grounds stated in the notice of reference. He may amplify them or justify the amount awarded on other grounds. The judge, with the assistance of the advice proffered to him by the assessors, makes his own estimate of the amount of compensation upon the evidence adduced before him; but if at the conclusion of the evidence he is not satisfied that the amount awarded by the collector is inadequate, the award must be upheld and the application dismissed. B C D

[37] The provision of s. 40D in our view only obliges the court to consider the views and opinions of the assessors but it does not in any way obviate the appellants from discharging the burden of establishing a *prima facie* case for the court to consider the appellants claim for an increased compensation. E

[38] Since there has been no evidence adduced that would establish a *prima facie* claim in favour of the appellant, the learned judge clearly erred in calling upon the assessor to produce a report for her to make the award. Arising from the failure of the appellants to establish a *prima facie* case the court has to accept the quantum of compensation as awarded by the Land Administrator. The respondent's counterclaim is accordingly allowed with fixed costs of RM5,000. F G

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